**IN THE HIGH COURT OF BOMBAY AT GOA**

**APPEAL FROM ORDER NO. 12 OF 2006**

1. Shri Dattatraya Shivaji Thorwat.

2. Smt.Yashoda Dattatraya Thorwat. ... Petitioners.

V/s.

1. Smt.Clothildes Souza
   widow of Caetano Piedade Vaz,

2. Smt.Luiza Maria Vaz e Gama,

3. Shri Martin Xavier Gama,

4. Agustinho Vaz,

5. Sebastian Luis Vaz,

6. Smt.Juliet Ena Fernades,

7. Ms.Natalina Vaz,

8. Silvestrina Dias
   w/o late Antonio Filipe Vaz,

9. Jose Bento Antonio Vaz,

10. Baptista Antonio Vaz,

11. Joaquim Antonio Vaz,

12. Succorina Antonio Vaz,

13. Alberto Caetano Cardozo
    s/o late Alexio Cardozo,

14. George Alberto Cardozo,

15. Luis Alberto Cardozo
    s/o Alberto Cardozo,

16. Maria Magdalena Cardozo,

17. Joao Lourenco Baptista,

18. Maria Yvonne Baptista

19. Jose Rosarinho Baptista,

20. Gracinda Jose Baptista,

21. Alex Joao Baptista,

22. Leena Alex Baptista,

23. Antonio Jose Roberto Cardozo
    s/o Alexio Caetano Cardozo,

24. Nicoline Roberto Cardozo
    w/o Roberto Cardozo,

25. Clara Colaco e Melo
    w/o late Dr.Luis de Mello,

26. Franzie Franklin Dias,
    d/o late Dr.Luis de Mello,

27. Franklin Robert Dias
    s/o Robert Dias,

28. Ivette Anunciacao Filomena
    de Piedade e Melo,

29. Datta B. Mahatme
    s/o Bhassu Mahatme,

30. Maria Lourdes Bernadette
    da Piedade Melo
    d/o late Epifanio de Mello,

31. Josefato Henriques,

32. Jose Antonio Agnelo Carmo
    Filomena de Piedade e Melo,

33. Clariza Agnelo D'Melo,

34. Ferdinando Gonzaga Filomeno
    da Piedade e Melo.

35. Evileen Ferdinando D'Melo,

36. Shri Narayan Shivaji Thorwat
    s/o Shri Shivaji Thorwat,

37. Smt.Shobha Narayan Thorwat,
    w/o Shri Narayan S. Thorwat,

38. Ashok Tukaram Korgaonkar,

39. Manisha Ashok Korgaonkar. ... Respondents.

S.K.Kakodkar, senior counsel with Manish Salkar for the petitioners.

P.P.Singh for respondent Nos.1 to 7.

T.George for respondent Nos.8 to 12.

Sudin M.S. Usgaonkar for respondent No.13.

Mike Mehta for respondent Nos.38 and 39.

**CORAM : V.C. DAGA, J.**

**DATED : 23rd August 2006.**

**ORDER :**

This appeal is directed against the order dated 4th November, 2005 passed in Special Civil Suit No.85/2005/III by the Third Additional Civil Judge, Senior Division, Margao below Exh.4 rejecting the application filed by the plaintiffs under order 39 rules 1 and 2 read with sections 94 and 151 of Code of Civil Procedure, 1908 ("C.P.C." for short) refusing to grant interim injunction as prayed by the plaintiffs (appellants herein) pending disposal of the suit.

2. The parties herein are referred in their original capacity as they were before the trial Court.

**Factual Matrix :**

3. The plaintiffs are claiming to be in possession of the suit property even since the sale in their favour vide registered sale-deed dated 22nd July, 1982. They contend that they have unassessable right; title and interest in the suit property; namely, the property admeasuring 1,786 sq.mtrs., surveyed in the City Survey Office of Margao under Chalta No.5 of P.T.Sheet No.57 ("suit property" for short)

4. It is necessary to trace chequered factual matrix of the litigation to appreciate case of the rival parties.

5. In the year 1956, one Shri Alexio Caeteno Cardozo ("A.Cardozo" for short) had filed suit; being Regular Civil Suit No.15247/1956/B against defendant No.1- Shri Antonio Vaz and his wife ("Vaz" for short) and eight others for demarcation of the property known as "Cupangali".

6. The case of Shri A.Cardozo was that he was the owner in possession of the said property and required demarcation. The defendant No.1- Shri A.Vaz opposed the said suit contending that the said property did not belong to Shri A.Cardozo and that it belonged to him.

7. In the year 1975, property "Cupangali" partitioned amongst co-owners, out of which, ¾ share came to be allotted to Shri A.Vaz. On 24th July, 1978, Shri A.Vaz, out of his ¾ share of "Cupangali" property, sold 1,786 sq.mts., suit property; to one Shri Narayan Shivaji Thorwat, defendant No.36 ("Narayan" for short).

8. On 22nd July, 1982, Shri Narayan sold the suit property to one Shri Dattatraya Shivaji Thorwat ("Dattatraya" for short).

9. In the year 1987, Shri Cardozo filed suit against Shri A.Vaz and S/Shri Thorawats being Regular Civil Suit No.287/87/D for declaration that sale-deed dated 24th July, 1978 between Shri Vaz and Shri Narayan and sale-deed dated 22nd July, 1982 between Shri Narayan and Shri Dattatraya are null

and void for contravention of section 52 of the Transfer of Property Act, 1982 and prayed for decree of permanent injunction restraining Thorwats from carrying out any construction in the said property and also prayed for interim injunction.

10. The trial Court vide its judgment and decree dated 16th November, 1991 decreed the said Regular Civil Suit No.15247/1956/B filed by Shri A.Cardozo seeking demarcation of the property. However, the District Judge vide his judgment and order dated 26th May, 1993 was pleased to dismiss the appeal being Regular Civil Appeal No.1/1992, filed by Shri Vaz challenging the aforesaid judgment and decree passed in Regular Civil Suit No.15247/1956/B.

11. In Second Appeal bearing No.35/1993 arising from the aforesaid judgment and order of the lower appellate Court dated 26th May, 1993, passed in Regular Civil Appeal No.1/1992, the above judgment and decree came to be set aside and the second appeal came to be allowed vide order dated 9th July, 1998. Consequently, Suit No.15247/1956/B filed by Shri A.Cardozo came to be dismissed. With the result, Cardozo's claim that the property

`Cupangali' surveyed under No.33332, which included property registered under No.31328, belonged to him was rejected and the claim of Shri Vaz the said property belonged to him was impliedly upheld.

12. In 1998, Cardozo approached the Apex Court by filing S.L.P., against the aforesaid judgment and order of the High Court dated 9th July, 1998 passed in Second Appeal No.35/1993, which, ultimately, came to be dismissed as withdrawn.

13. In between, on 31st July, 1996, the Civil Court was pleased to pass *ex parte* decree in another civil suit filed by Shri Cardozo being Regular Civil Suit No.287/87/D referred to heinabove in para- 9 (supra).

14. On 9th August, 2004, Shri Dattatraya entered into an agreement to sale the suit property in favour of one Shri Ashok Korgaonkar for Rs.45 lakh payable within five months. However, Dattatraya claimed to have acquired knowledge; on 2nd February, 2005, about *ex parte* decree dated 31st July, 1996 in Suit No.287/87/D in which sale-deeds of 1978 and 1982 were declared null and void.

15. At this stage, it will be relevant to note that Shri Vaz; on 29th April, 2005 sold suit property to Shri Korgaonkar joining Shri Cardozo as confirming party thereto.

16. On 27th May, 2005, Dattatraya applied for setting aside *ex parte* decree dated 31st July, 1996 passed in Suit No.287/87/D by moving Civil Misc. Application No.22/2005 with an application for condonation of delay. However, on 31st August, 2006, Dattatraya withdrew that application contending that the said *ex parte* decree being *ab initio* void and unenforceable need not be set aside, since he had already chosen to file Special Civil Suit No.85/2005 for such declaration. With the result, on 29th September, 2005 Civil Misc.Application No.22/2005 came to be dismissed as withdrawn.

17. On 10th October, 2005, Dattatraya filed suit being Suit No.221/2005 against Hindustan Petroleum and Shri Korgaonkar for recovery of possession of the suit property and permanent injunction restraining Korgaonkars from carrying on any construction in the suit property. However,

the said suit also came to be dismissed as withdrawn.

18. As already narrated hereinabove, in the suit filed by Shri Dattatraya being Suit No.85/2005/III an application for temporary injunction restraining the defendants from, in any way, interfering with the plaintiffs' possession and enjoyment of suit property moved by the plaintiffs came to be rejected by the trial Court vide its order dated 4th November, 2005. for the following reasons:

19. This order of the trial Court is a subject matter of challenge in this appeal against order.

**Submissions** :

20. Mr.Kakodkar, learned senior counsel, appearing for the appellants/ plaintiffs submits that the impugned order of the trial Court is erroneous and the findings recorded therein are perverse. In his submission, the decree passed in Suit No.287/87/D is null and void and non-est. That the Court had no jurisdiction to declare

transfers pendent lite null and void. In his submission, section 52 of the Transfer of Property Act invoked by the trial Court did not give jurisdiction to the Court to grant such relief. The decree being without jurisdiction is void and non-est.

21. Mr.Kakodkar submitted that it was not necessary take out any further proceedings to set aside the said decree which is null and void. In his submission, it can be assailed in a collateral proceeding in which it is sought to be enforced upon. Reliance is placed on the judgment of the Apex Court in the case of Kiran Singh v. Chaman Paswan, AIR 1954 SC 340.

22. Mr.Kakodkar also submits that defendant Noa.1 to 7 (Vaz) were estopped from contending that sale to Narayan in 1978; however, was null and void. In the submission of Mr.Kakodkar, assuming without admitting, that Shri Vaz had no title to the suit property in 1978 upon withdrawal of the suit property from the purview of the litigation in the Supreme court and acknowledgment by Shri Cardozo of the title in Shri A.Vaz, estoppal will feed the grant under section 43 of the Transfer of

Property Act and the title would get vested in Narayan since 1978.

23. Mr.Kakodkar further submits that the temporary injunction in Suit No.287/87/D and decree of permanent injunction therein did not disturb appellants/ plaintiffs' possession and enjoyment of suit property. In support of his submissions, he relied upon various judgments, viz.; ***Shakuntala Devi v. Kamla***, 2005 (3) Mh.L.J. 578; ***M.L.Sethi v. R.P.Kapur***, (1972) 2 SCC 427, ***Dinkar v. Shrirang***, 1992 Mh.L.J. 248 and ***Nagubai v. B.Shama Rao***, AIR 1956 SC 593 (He, thus, submits that the impugned order of the Court below is liable to be quashed and set aside.

24. Per contra, Mr.P.P.Singh, learned counsel appearing for defendant Nos.8 to 12 and other advocates appearing for defendant Nos.1 to 7 and 13 tried to support the impugned order contending that after cancellation of sale deeds dated 24th July, 1978 and 22nd July, 1982 by judgment and decree dated 31st July, 1996 passed in Suit No.287/87/D, the plaintiffs have lost their rights in to the suit property. Until and unless the said judgment and order is reversed and/or quashed and/or set

aside by the competent court, the said judgment and order shall hold the field.

25. Mr.Singh further submits that it is an admitted fact that no appeal was filed by the plaintiffs against the said adverse judgment and order dated 31st July, 1996 as such the said judgment has become final and conclusive and shall operate as res-judicata between the parties. In his submission, the plaintiffs rights have automatically extinguished and stood terminated vide judgment and order dated 31st July, 1996.

**Issue** :

26. The rival contentions give rise to the following issue:

> Whether or not the view taken by the trial Court is reasonable and possible?

**Scope of Appeal** :

27. Before adverting to the aforesaid issue, it is necessary to bear in mind the length and

breadth of the jurisdiction of the appellate Court while considering the appeal against the interim order passed by the trial Court. The appellate Court is not expected to interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant of refusal of interlocutory injunction. An appeal against exercise of discretion is said to be an appeal on principle. The appellate Court is not expected to reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. if the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial Court's exercise of discretion (see ***U.P.Co-operative Federation*** **v.** ***Sunder Bros.,*** AIR 1967 SC 249 and ***Rampal Singh*** **v.** ***Rias Ahmad Ansari*** 1990 (Supp) SCC 727).

**Consideration :**

28. Having examined the jurisdiction of the appellate Court, now, it is necessary to turn to the rival submissions.

29. The basic contention advanced by Mr.Kakodkar is that the decree in Suit No.287/87/D is *ab initio* void being without jurisdiction. The said decree can be attacked even in the collateral proceeding in which it is sought to be enforced and relied upon.

30. In order to appreciate the above submission, one has to turn to section 9 of C.P.C. which at the threshold primarily deals with the jurisdiction of the Civil Court to entertain a cause. It lays down that subjects to what are contained in sections 10, 11, 12, 13, 47, 66, 83, 84, 91, 92, 115 etc., the Civil Court has jurisdiction to entertain a suit of civil nature except of which cognizance is expressly barred or barred by necessary implication.

31. Civil Court has jurisdiction to decide the question of its own jurisdiction although as a result of the enquiry it may eventually turn out that it has no jurisdiction over the subject matter.

32. The effect of an order passed by the Court having no jurisdiction *ab initio* and the effects of an order passed by the court which loses the jurisdiction subsequently are different quantitatively. In the first case, the order can never be enforced. In second case, all the orders and decisions passed by the court till the date on which Court loses its jurisdiction are valid orders and decisions and can be enforced, but only as regards the liability accrued till the date as laid down by this Court in ***Kapil P.Mahmed* v. *S.Anthony***, 1985 (1) Civ.L.J. 376 at p.397 (Bom).

33. The jurisdiction of the Court depends upon the plaint pleadings of a suit and not on the averments made in the written statement. By the defence put forward the defendant cannot force the plaintiff to go to a forum not of plaintiff's choice. Jurisdiction depends upon the allegations in the plaint and not on the defence; not upon

those which may, ultimately, be found true. Whether the Court has jurisdiction or not does not depend upon the falsehood or truth of the case into which it has to enquire, or upon the correctness of the findings of those facts, but upon their nature and it is determinable at the commencement and not at the conclusion of the trial. For once the proceeding is properly initiated the determination would not be regarded as without jurisdiction on account of any procedural defect in the course of enquiry because a Court has jurisdiction to decide rightly as also wrongly. (see ***Ujjam Singh v. State of U.P.***, AIR 1962 SC 162).

34. The concept of inherent lack of jurisdiction is well recognized in the field of law. The court can be said to lack inherent jurisdiction when the subject matter before it is wholly foreign to its ambit and is totally unconnected with its recognized jurisdiction. In the matter of execution of decrees, it is well settled that the executing court cannot go beyond the decree between the parties or their representatives and must take the decree according to its tenor until it is set aside by an appropriate proceeding in appeal or revision and

must accept the decree as it is, even if it be erroneous (see ***V.D.Modi* v. *A.Rehman***, AIR 1970 SC 1475). There is well-established exception to this that if there was lack of inherent jurisdiction in the Court which has passed the decree, then the decree is a nullity and the executing Court has to refuse its execution. In ***Sunder Das* v. *Ram Parkash***, AIR 1977 SC 1201, the Apex Court has laid down that the validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction. The sense of lacking inherent jurisdiction was illustrated as when the Court could not have seisin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time of institution of the suit or when the suit was decreed. If the Court has power to entertain a cause of a particular category or nature the Court does not lack jurisdiction inherently.

35. It is also a settled principle of law that doctrine of constructive *res judicata* does not apply to a case where the Court inherently lacked jurisdiction *ex facie* and proceeded to determine the cause.

36. The upshot of the aforesaid discussion is that it is only the lack of inherent jurisdiction that can be put forward to contend that the decree is *ab initio* void. On the other hand, when the Court exercises its jurisdiction illegally, the result which is reached is again void, but is not a case where the exercise of jurisdiction is void *ab initio*. Inherent lack of jurisdiction can be put forward in defence whenever it is sought to be enforced or in any collateral proceeding. A decree passed by the Court without jurisdiction is nullity and its invalidity can be set up whenever and wherever it is sought to be enforced or relied on, even at the stage of execution and even in collateral proceeding. A defect of jurisdiction in respect of subject matter of the action strikes at the very authority of the Court and such defect cannot be cured by consent of parties.

37. With the aforesaid backdrop of settled legal principles of law, if one turns to the factual matrix of the case, it cannot be disputed that a Civil Court, prima facie; did have a jurisdiction to entertain Regular Civil Suit

No.287/87/D seeking cancellation of the sale-deeds dated 24th June, 1978 and 22nd June, 1982. It is also not in dispute that the said Court decreed the suit, may be *ex parte*, on 31st July, 1996. It is also not in dispute that till the *ex parte* decree in the suit, the Civil Court had a jurisdiction to entertain and try the suit in question. It is undisputed that the said *ex parte* decree has become final and conclusive. Under these circumstances, the view taken by the Court below that the decree is not *ab initio* void cannot be faulted.

38. It is also on record that the plaintiffs had filed application to set aside the said *ex parte* decree dated 31st July, 1996 passed in Regular Civil Suit No.287/87/D, which was, subsequently, withdrawn on 31st August, 2005. It is also on record that Regular Civil Suit No.221/2005 was also filed against the Hindustan Petroleum Ltd. and defendant No.38 seeking permanent injunction and possession of the suit property. However, since no *ex parte* temporary injunction was granted by the Court, the said suit was withdrawn.

39. The plaintiffs have claimed to have terminated the agreements in favour of defendant No.38. However, till date the plaintiffs have not refunded the amount advanced by defendant No.38 contending that defendant No.38 has not given his bank account number and has not stated in which manner he wanted money. Ample material is available on record to reach to the conclusion that the plaintiffs are not in possession of the suit property. The trial Court has also recorded finding in this behalf holding that the plaintiffs are not in possession of the suit property at least after the order dated 12th April, 1991 passed by the District Court dismissing their appeal. The said order dated 24th April, 1991 was further confirmed the judgment and decree dated 31st July, 1996 which still stands and remained unattacked. The High Court judgment dated 9th July, 1998 passed in Second Appeal No.35/1993 can hardly have an effect on the *ex parte* decree dated 31st July, 1996 because by that time this decree had become final and conclusive. The same has not been challenged till date by the plaintiffs. Now, it is not open to challenge in the fresh suit.

40. The above decree, may be *ex parte*, will, prima facie; operate as *res judicata* between the parties. It is a well settled law that principles of estoppel and *res judicata* are based on public policy and justice. Doctrine of *res judicata* is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of *res judicata* prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are `cause of action estoppel' and `issue estoppel'. These two terms are of common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that issue was wrongly determined. Their only remedy is to approach the higher forum, if available. The determination of the issue between the parties

gives rise to an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of C.P.C. Contains provisions of *res judicata* but these are not exhaustive of the general doctrine of *res judicata*.

41. The plea of *res judicata,* though technical, is based on public policy in order to put an end to litigation. It is, however, a different if an issue which had been decided in earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile law has changed or has been interpreted differently by higher forum.

42. It must be remembered that a judgment *inter partes* rendered by a court of competent jurisdiction would bind the parties. As Chagla, C.J. Stated in ***Province of Bombay v. Municipal***

***Corporation of Ahmedabad***, AIR 1954 Bom 1, "the law laid down by a court and applied by it to the facts before it in determining whether the party is entitled to the relief or not would be `*res judicata*' if the parties sought to relegate the same facts or to claim the same relief. *However erroneous the decision as to the law might be, it would be binding as between the parties*."

43. The trial Court, in the above backdrop, has rightly concluded that earlier adverse decree suffered by the plaintiffs will operate as *res judicata* and that neither prima facie case exists nor balance of convenience lies in favour of the plaintiffs. That no legal injury would be suffered by the plaintiffs, if no interim relief is granted. The view taken by the Court below is a reasonable and possible view warranting no interference of this Court.

44. Thus, taking overall view of the submissions advanced on behalf of the appellants/ plaintiffs, the appeal has no merit. It is made clear that all the observations made in this order are prima facie. The trial Court shall be free to

decide suit on its own merits uninfluenced by what is observed herein at this stage of the suit.

In the result, appeal is dismissed in limine with no order as to costs.

**(V.C. DAGA, J.)**